89-668

No. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court Of The United States

OCTOBER TERM

ROY G. POWELL and
DIXIE LEE POWELL, in Propria Persona

Petitioners,

v.

UNITED STATES DISTRICT COURT,
Real Party of Interest, and
JUDGE ALFREDO C. MARQUEZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI ON REVIEW OF WRIT OF MANDAMUS FROM NINTH CIRCUIT COURT OF APPEALS, ARIZONA DISTRICT

Roy G. Powell,
Dixie Lee Powell,
P. O. Box 145,
Safford, Arizona 85548

In Propria Persona

35 pp

QUESTIONS PRESENTED ON APPEAL

1) Has the indictment violated defendants' Sixth Amendment right to be informed of the Nature and Cause of the criminal charges for failure to file "an income tax return" when the "return" is neither specified nor defined?

2) As natural-born residents of the State of Arizona, not residents of any of the "States" or "instrumentalities" under Title 26 jurisdiction are defendants protected thereby?

3) Was the United States District Court for the District of Arizona, and more particularly the Judge, Alfredo C. Marquez, within its discretion in denying defendants' Motion to Dismiss for Failure to State a Cause of Action contrary to its sworn duty to uphold the Constitution of the United States?

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In The

SUPREME COURT OF THE UNITED STATES

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Petitioners,

-vs-

UNITED STATES DISTRICT COURT,
Real Party in Interest, and
JUDGE ALFREDO C. MARQUEZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI ON REVIEW OF WRIT OF MANDAMUS FROM NINTH CIRCUIT COURT OF APPEALS ARIZONA DISTRICT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment of the Ninth Circuit Court of Appeals entered on August 30, 1989 denying Writ of Mandamus 70326.

STATEMENT OF JURISDICTION

This petition for Review of Writ of Mandamus is brought pursuant to the Constitution of the United States, Article III, Amendment VI, and U.S.C. 28 Section 1259 and Section 1651.

The Petitioners have exhausted their available remedy with the denial of the Writ of Mandamus by the Ninth Circuit Court of Appeals, and after the Ninth Circuit also dismissed Petitioners' Appeal from the Order of the District Court of a Motion to Dismiss for Failure to State a Cause of Action, Order dated April 10, 1989, and Appeal dismissed August 17, 1989. These decisions are final for review by this Court on a Writ of Certiorari

CONSTITUTIONAL PROVISIONS:

Article I, Section 8, Clause 17: "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

Article III, Section 2: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Article IV, Section 3, Clause 2: "The Congress shall have power to dispose and make all needed Rules and Regulations respecting the Territory or other property belonging to the United States;

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence."

STATUTES

U.S.C. 26, Sections 3121,
U.S.C. 26, Section 7203,
U.S.C. 26 Section 7701
U.S.C. 28, Section 1259
U.S.C. 28, Section 1651.

STATEMENT OF THE CASE

On March 14, 1989, defendants Roy G. Powell and Dixie Lee Powell were handed a summons, charging them with violations of Section 7203, Title 26 by indictment of a Tucson, Arizona federal Grand Jury. Thereafter on March 28, 1989, defendants challenged the indictment in a Motion to Dismiss for Failure to State a Cause of Action.

The indictment merely alleged that defendants had failed to file "an income tax return," without specifying which return or returns they were required to have filed, if any.

Defendants were unable reasonably to determine inductively or deductively, or otherwise draw a conclusion of which return or returns they had failed to file.

Without reason or opinion, the District Court denied defendants' Motion to Dismiss.

The accused made special appearances at

Federal Court on March 17, March 29, and April 6, 1989. On April 6, the accused stated they were unable to understand the nature and cause of the action of charges, stated they were unable to plead, and objected to the Magistrate's making a plea for them. The indictment fails to specify the level or degree of charges.

Petitioners filed the Writ of Mandamus August 9, 1989 in the Ninth Circuit Court of Appeals, which was denied August 30, 1989.

Petitioners will suffer irreparable harm and injury to their substantive rights if this matter proceeds to trial without notice of the specific charge. The acts charged will not, if proved, support a conviction for the offense charged. The return or returns required to be filed have not been clearly and specifically stated, such that a reasonable man could decide directly or deductively from the whole of the indictment what was intended to be charged.

Further, petitioners will suffer irreparable injury to their substantive rights by failure of the indictment to give notice of the charge. It is a violation of due process to convict an accused on a charge that was not made. *Cole v. Arkansas,* 92 L Ed 644.

The government has had adequate notice that the indictment is defective, and has failed to remedy the defect in a timely manner. The government comes to court violating petitioners' rights.

WHEREFORE, petitioners pray that these proceedings and further prosecution by the government be stayed pending final determination upon appeal of the decision to the United States Supreme Court. The Writ of Mandamus was filed in an original action in the Court of Appeals August 9, 1989, and a Motion for Stay under Rule 8 of the Rules of the U. S. Supreme Court directed first to the District Court is not practicable.

MEMORANDA OF POINTS AND AUTHORITIES

"No principle of procedural due process is more clearly established than that Notice of the specific charge (is) among the Constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas*, L Ed 644, 333 U. S. 201.

The essential essence of any complaint is that sufficient facts be recited from which the conclusion can be drawn that a crime has been committed, and that the defendants committed it. The indictment fails to advance any specific facts which are indicative of criminal misconduct by the defendants. The defectiveness is such that no crime has been charged. Allegations of criminal charges cannot rest upon ambiguities. *Russell v. U. S.*, 8 L Ed 240, 254.

Further, this lack of specificity is a violation of Due Process Fair and Adequate Notice.

"Valid information must include essential elements of offense charged, sufficient descriptions of elements to inform defendant of nature and cause of charge, and adequate description to permit later defense of former jeopardy.

"Information or indictment is insufficient if it does not allege all essential elements of offense charged; if an essential element is omitted, it cannot be supplied by intendment, implication or liberal construction.

"Information which fails to allege all essential elements of offense charged is incapable of charging crime and so fatally defective that it cannot confer jurisdiction upon the trial court.

"In addition to describing alleged crime in bare statutory language, charging information for certain offenses must also specify actual conduct or circumstances, or thing or means used. *Plotner v. State*, 762 P 2d 936.

Defendants have a right to be informed of the nature and cause of the specific charges, and in this case, they must have specified the actual conduct or circumstances, or thing or means used.

"A crime is made up of acts and intents, and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstance." *U. S. v. Cruikshank*, 23 L Ed 593.

Without a clear and accurate allegation of the specific return or returns not filed, no intent or omission has been alleged. Without specificity, there is a failure to state a Cause of Action.

Procedural due process contemplates information as to the claims of the opposing party with reasonable opportunity to controvert them" *Morgan v. U. S.* 82 L Ed 1129. Defendants are therefore unable to know the Nature and Cause of the accusation, raise relevant claims, prepare adequate defenses, and raise timely issues.

As far as the provisions of Title 26, U. S. C. are concerned, defendants are natural-born residents of the State of Arizona and are not the subject or object of the same controls as citizens of the United States or States (the District of Columbia) or political subdivisions thereof.

U.S.C. Title 26 (1982 edition)
Section 3121. Definitions.
(e) the state, United States, and citizen. . .
For the purposes of this chapter
(1) State
The term "states" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

and then Section 7701. Definitions:
(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof - -

(9) United States

The term "United States" when used in geographical sense includes only the States and the District of Columbia.

(10) State

The term "State" shall be construed to include the District of Columbia, where construction is necessary to carry out provisions of this title.

Article IV, Section 3, Clause 2 of the Constitution:

"The Congress shall have power to dispose and make all needed Rules and Regulations respecting the Territory or other property belonging to the United States; . . .

Upon admission into the union of territories a distinct jurisdictional line was drawn, as is shown in *M'Ilvaine v. Coxe's Lessee*, 8 U. S. (4 Cranch) 209 (1808):

"This opinion is predicated upon a principle which is believed to be undeniable, that the several states which composed this union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that they did not derive them from concessions made by the British king The treaty of peace contains a recognition of their independence, not a grant of it. From hence it results, that the laws of the several state governments were the laws of sovereign states, and as such were obligatory upon the people of such state, from the time they were enacted." 4 Cranch, at 212.

A further verification of the last cite is found in *Harcourt v. Gaillard,* 25 U. S. (12Wheat) 523 (1827), where the Court stated:

"There was no territory within the United States that was claimed in any other right than that of some one of the confederated states; therefore, there could be no acquisition of territory made by the United States distinct from, or independent of some one of the states. Each declared itself sovereign and independent, according to the limits of its territory. The soil and sovereignty within their acknowledged limits were as much theirs at the declaration of independent as at this hour," 12 Wheat, at 526, 527.

Under the Articles of Confederation, the central government was weak, and the Constitution was written to remedy this weakness, while the states retained their sovereignty. Article I, Section 8, Clause 17 limited federal jurisdiction:

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the

Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

And in *New York v. Miln*, 36 U. S. (11 Pet.) 102 (1837), the Court held:

" . . . that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal policy, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive." 36 U. S., at 139.

In these days of federal aid, federal subsidies, federal speed limits, and especially "public law" as passed by the Congress, we wonder at the erosion of the sovereignty of the several states,

and especially of the rare unenfranchised individual. For instance, does the right to vote cause the voter to be under the special privilege of the federal government, and thus have his wages taxable under some unknown jurisdiction? Certainly not under the Public Salary Tax of 1939, or the Victory Tax of 1942, or the provisions of the 16th Amendment, but then how?

Respondent, United States District Court, with Judge Alfredo C. Marquez holding the office designated as "Court" is "bound by the Constitution and the Laws of the United States which shall be made in Pursuance thereof," and also "bound by Oath or Affirmation," to support the plain provisions of the Constitution including but not limited to the Sixth Amendment right to be informed of the Nature and Cause of the Action. Respondent had no discretion to violate the United States Constitution in denying the Motion to Dismiss for Failure to State a Cause of Action.

CONCLUSIONS

Petitioners conclude the Indictment is insufficient to provide the nature and cause of the action, in violation of the Sixth Amendment right to due process, failed to show the level or degree of offense, and Defendants cannot be expected to know how to plead, or how to make a defense against an unknown offense, and that the United States District Court with Judge Alfredo C. Marquez had no discretion to violate the plain provisions of the Constitution, also to violate his Oath to support and defend the Constitution.

REASONS FOR GRANTING WRIT

Defendants are being forced to trial under extreme hardship. They are forced to borrow money to make the trips to Tucson, and are unable to afford an attorney, although the District Court has ruled Defendants must pay for a public defender if one is appointed. Roy has stress-caused congestive heart failure, but is intent on up-holding the Constitution in truth and justice for the rest of his life.

If he fails to take the water pills regularly, he almost drowns in the water collecting around his heart and lungs, and if he does take the pills, he must use a bathroom about every half hour. Dixie suffered a fall which collapsed four spinal discs and caused permanent nerve damage so that she has nearly complete bladder and bowel incontinence. She is on State Compensation for the rest of her life ($426.81 each month), being unable to continue in the classroom.

Following a strict diet, eating almost no food, using medication and herbs judiciously, and limiting liquids stringently helps us to function one day at a time, but would not be possible for any extended period, especially under the stress of a court trial.

The District Court Judge in denying our Motion to Dismiss for Failure to State a Cause of Action violated our rights to due process under the Constitution, and his own oath to support and defend the Constitution.

PETITIONERS' PRAYER FOR RELIEF

WHEREFORE, the petitioners pray this Court finds that Petitioners were not given due process in that the nature and cause of the charges were not defined, nor specified, and therefore the Court had no jurisdiction,

That the Court violated its sworn duty to uphold and defend the plain provisions of the Constitution in denying Petitioners' Motion to Dismiss for Failure to State a Cause of Action, going beyond the discretion of the Court,

And that the Writ of Mandamus should issue as requested by Petitioners,

And such other relief as this Court may deem just and proper.

Respectfully submitted,

Signature Roy J Powell

Signature Lupie Lee Powell

ROY G. POWELL
DIXIE LEE POWELL

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES OF AMERICA	)	
Plaintiff,	)	CR 89-085-TUC
-vs-	)	ACM
ROY G. POWELL and	)	
DIXIE LEE POWELL,	)	
Defendants.	)	
	)	

MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION

COMES NOW the defendants and respectfully gives this Court Notice that the complaint in the above complaint fails to specify with particularity which return or returns it is alleged was not or were not filed, out of some 241 returns required to be filed by the Internal Revenue Service of "persons who are required," or "who are made liable,", or taxpayers subject to" the Code and/or the I.R.S. Regulations. It is a Sixth Amendment violation to fail to inform one of the Nature and Cause of the Failure to File charges.

"A crime is made up of acts and intent, and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstance." *U. S. v. Cruikshank,* 23 L Ed 593. Without a clear and accurate allegation of the specific return or returns not filed, no intent or omission has been alleged. Without specificity, there is a failure to state a Cause of Action.

Further, this defect of specificity is a violation of Due Process Fair and Adequate Notice. "No principle of procedural due process is more clearly established than that Notice of the specific charge (is) among the Constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas,* 92 L Ed 644, 333 U. S. 201.

The essential essence of any complaint is that sufficient facts be recited from which the conclusion can be drawn that a crime has been committed, and that the defendants committed it. The indictment fails to advance any specific facts which are indicative of criminal misconduct by the defendants. The defectiveness is such that no crime has been charged. Allegations of criminal charges cannot rest upon ambiguities. *Russell v. U.S.* 8 L Ed,

240, 254.

Further, the failure to inform with required specificity, and taking of property without due process violates the Charter of the Organization of American States, 2 UST 2394, Chapter II, Article 5 prohibiting violation of fundamental rights.

For the reasons stated above the defendants respectfully request that the charges be dismissed with prejudice.

Excludable delay under 18 U.S.C. Section 3161(h) will occur as a result of this motion or of an order based thereon.

Signature /s/ Roy G. Powell, Defendant
/s/ Dixie Lee Powell, Defendant

A copy of the foregoing mailed to:
REESE V. BOSTWICK, Assistant U. S. Attorney,
110 S. Church Street, on 3/28/89
Tucson, Arizona. Certified P 920 351 195
JANET FREEMAN, U. S. Attorney,
U. S. Department of Justice, on 3/28/89
P. O. Box 972, Certified P 920 351 194
Washington, D.C.
Original and copy hand delivered to Clerk, U. S. District Court, Tucson, Arizona on 3/28/89.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROY G. POWELL and	)	
DIXIE LEE POWELL,	)	
Petitioners,	)	Civil Action File ____
-vs-	)	70326
ALFREDO C. MARQUEZ,	)	
Respondent.	)	

PETITION FOR WRIT OF MANDAMUS

I

Petitioners reside at P. O. Box 145, City of Safford, County of Graham, State of Arizona. Respondent is the duly qualified and acting judge of the Federal District Court, Arizona District, City of Tucson. Petitioners are defendants named and served in a certain action entitled U. S. v. Powell. United States, Plaintiff, versus Powells, Defendants, being Cause No. CR 89-085-TUC-ACM in U. S. District Court.

I I

On or about March 14, 1989, Petitioners were summoned as Defendants to appear before the Court in the above entitled and numbered

action to answer the indictment issued in the action by which the Petitioners in this action demanded of the Respondent that the case be dismissed.

III

In obedience to said summons, the Petitioners appeared before the Court within the time limits of the summons and entered an objection to the jurisdiction of the Court by filing a Motion to Dismiss for Failure to State a Cause of Action by failure of the indictment to adequately inform the Petitioners of the Nature of the Charges brought against them. The indictment merely stated the Petitioners had failed to file "an income tax return" without specifying which return or returns. Petitioners are therefore unable to know the Nature and Cause of the accusation, to raise relevant claims, prepare adequate defenses, and raise timely issues.

IV

Respondent has been duly elected to and now holds and enjoys the office of Judge in the Federal District Court. It was, and still is, the duty of Respondent to be "bound by the Constitution and the Laws of the United States which shall be made in Pursuance thereof," and also to "be bound by Oath or Affirmation," to support the plain provisions of the Constitution including the Sixth Amendment right to be informed of the Nature and Cause of the Action. The Respondent had no discretion to violate the United States Constitution.

V

The Petitioners have demanded of Respondent that Respondent dismiss the indictment; but notwithstanding the demand, Respondent has refused to dismiss the indictment and still refuses to dismiss the indictment.

VI

On April 19, 1989, Petitioners appealed the Order denying Petitioner's Motion to Dismiss, thereafter the Government filed a Motion to Dismiss in the Appeals Court for lack of jurisdiction. Petitioners' Appeal was dismissed June 5, 1989, and Motion for Rehearing was filed. With a denial of Petitioners' Appeal, the issuance of this Writ is indispensable to the enforcement of Petitioners' Sixth Amendment rights.

VII

Wherefore, Petitioners pray that there be issued against Respondent a Writ of Mandamus compelling Respondent to Dismiss the Indictment or to Show Cause why he should not do so.

The foregoing is true to the best of my knowledge and ability.

Signature /s/ Roy G. Powell

Signature /s/ Dixie Lee Powell

MEMORANDUM OF POINTS AND AUTHORITIES

Existing Legal Right With a Remedy.

It is an axiom of the common law that for every legal right there is an remedy, and that if no remedy exists, one shall be supplied. Mandamus is available through this court by authority of 28 U.S.C. 1651, the "all writs" statute:

> "Its (Court of Appeals) authority is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction, although no appeal has been perfected." *Roche v. Evaporated Milk,* 319 U. S. 25.

If the petitioners must wait until a final judgment in the trial court, the right to be informed with particularity of the charges is lost. This right applied at the beginning of trial and not at the time of appeal or sometime thereafter.

> "Notice to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity." *Application of Gault*, 87 S. CT. 1428, 387 U. S. 33.

Under the rules of appellate procedure, issues must be timely raised in the trial court, otherwise they are lost for purposes of appeal.

> "It is clear that this court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised." *Edelman v. California*, 97 L Ed 387, 344 U. S. 358.

Without adequate knowledge of the charges, the Petitioners will be permanently barred from the opportunity to raise claims and defenses in the trial court that they could have raised had they been adequately informed of the charges. Court proceedings are not to be "conducted on the level of a game of blindman's buff." *Simmons v. U. S.* 99 L. Ed 453, 348 U. S. 405.

Discretion of the Trial Judge

Denial of Petitioners' Motion to Dismiss, for purposes of the "final judgment rule was not an exercise of discretion of the trial judge." There is no discretion to violate the plain provision of the U. S. Constitution. There is "no discretion to violate the federal constitution; its dictates are absolute and imperative." *Owen v. City of Independence,* 63 L Ed 2d 673, 443 U. S. 649.

The Sixth Amendment clearly provides for the right to know "the nature and cause of the accusation." The allegation that the Petitioners have "failed to file a tax return," is a fatal defect of the indictment and no amount of the exercise of discretion can correct the defect.

> "No amount of judicial discretion of a court can supply a defect of want to jurisdiction." *U. S. v. Bradley,* 19 L Ed 214, 7 Wall. 377.

Could it have been reasonably and indubitably concluded from the indictment which return or returns were to be filed, there would have been a basis for dismissing the motion of the

Petitioners. It cannot be so concluded which returns were to be filed. There are attached, a number of tax returns which could be applicable. The determination of the right one can only be speculative.

The statute, for which a violation has been charged, 26 U.S.C. 7203, does not clarify the indictment:

> Sec. 7203. Willful failure to File Return, Supply Information, or Pay Tax.
> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return . . ."

The indictment taken with the statute does not indicate which returns were required to be filed. Therefore, the trial judge had no discretion in refusing to dismiss the indictment. An indictment which fails to state a cause of action is no indictment at all, and the district court acquires no jurisdiction over the pretended cause of action.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Date April 10, 1989

UNITED STATES OF AMERICA	)	
PLAINTIFF	)	No. CR 89-085
-vs-	)	TUC ACM
ROY G. POWELL and DIXIE LEE POWELL	)	ORDER
DEFENDANT.	)	

IT IS ORDERED that defendants' Motion to Dismiss for failure to state a cause of action is DENIED.

/S/ ALFREDO C. MARQUEZ
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed Aug 30 1989, Cathy A. Catterson, Clerk, U. S. Court of Appeals.

ROY G. POWELL and	)	No. 89-70326
DIXIE LEE POWELL	)	DC# CR 89-85-
Petitioners	)	ACM
-vs-	)	Arizona(Tucson)
UNITED STATES DISTRICT	)	
COURT FOR THE DISTRICT OF	)	ORDER
ARIZONA	)	
Respondent,	)	
UNITED STATES OF AMERICA,	)	
Real Party in Interest.	)	
	)	

Before: FARRIS, REINHARDT and NOONAN, Circuit Judges

The petition for writ of mandamus is denied.